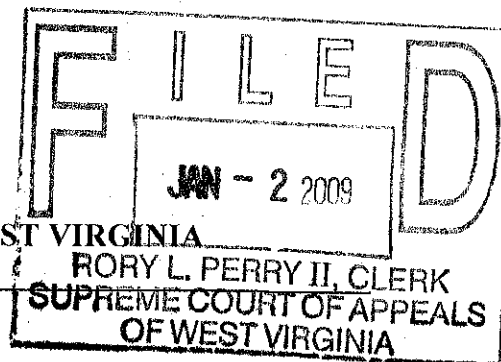


NO. 34598

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON



IN RE:

Ryan Adric B

06-23-07

JUVENILE PETITION NO.

07-JA-39-2

FROM THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA
HONORABLE THOMAS A. BEDELL, JUDGE

BRIEF OF COUNSEL FOR THE INFANT CHILD, RYAN B.

TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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Ryan B.

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Of Counsel

Kind of Proceeding and
Nature of Ruling in the Circuit Court

The recitation of the procedural history and the facts presented by the Appellant and Appellee Briefs to this Court are accurate and not disputed by counsel for the infant child with one exception. The Appellant asserts that the Appellee is an active member of the military service at present time. While the record below will reflect the intent of the Appellee to become a member of the armed services, nothing in the record reflects that he in fact followed through with the intent and is currently employed in such (or any other) capacity.

Argument

The Circuit Court Of Harrison County Did Not Commit Error In Denying The Respondent Mother's Verbal Motion for Post-Relinquishment Child Support Because The Goal Of Abuse And Neglect Proceedings Is Permanency And Finality For The Infant Child And The Award Of Child Support May Thwart That Goal.

West Virginia Code § 49-6-7 permits a parent to voluntarily relinquish his or her parental rights. "Such voluntary relinquishment is valid pursuant to W. Va. Code § 49-6-7 if the relinquishment of parental rights is made by 'a duly acknowledged writing' and is 'entered into under circumstances free from duress and fraud.'" *In re: Cesar L.*, 221 W.Va. 249, 257 654 S.E.2d 373,381 (2007). "[A] voluntary relinquishment permanently severs the parent-child relationship and relieves such person of all the rights and privileges, as well as duties and obligations..." *Id.* at 258.

It is the safeguarding of the child that is the paramount concern in abuse and neglect proceedings. "Ensuring finality for these children is vital to safeguarding their best interests so that they may have permanency and not be continually shuttled from placement to placement." *Id.*, (referencing Syl. pt. 1, in part, *In re Carlita B.*, 185 W. Va. 613, 408 S.E.2d 365 (1991)). Consequently, the Court typically has "considered a termination or relinquishment of parental rights

as achieving finality through the cessation of that particular parent-child relationship, which then facilitates the child's permanent placement and/or adoption.” *Id.*

In *In Re Cesar L.*, this Court held that “[a] final order terminating a person's parental rights, as the result of either an involuntary termination or a voluntary relinquishment of parental rights, completely severs the parent-child relationship, and, as a consequence of such order of termination, the law no longer recognizes such person as a ‘parent’ with regard to the child(ren) involved in the particular termination proceeding.” *Id.* at Syl. pt. 4. The Court further stated at Syllabus Point 5 that a valid voluntary relinquishment of parental rights, relinquishes the “rights to participate in the decisions affecting a minor child” and “causes the person relinquishing his/her parental rights to lose his/her status as a parent of that child.” *Id.* at Syl. pt. 5.

West Virginia Code § 49-6-5(a)(6) states that a court may “[u]pon a finding that there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future and, when necessary for the welfare of the child, terminate the parental, custodial and guardianship rights and *responsibilities* of the abusing parent and commit the child to the permanent sole custody of the nonabusing parent, if there be one, or, if not, to either the permanent guardianship of the department or a licensed child welfare agency.” § 49-6-5(a)(6)(2008)(emphasis added).

West Virginia Code § 49-7-5 addresses child support during the pendency of the abuse and neglect action. It states that “[i]f it appears upon the hearing of a petition... that a person legally liable for the support of the child is able to contribute to the support of such child, the court or judge shall order the person to pay the state department, institution, organization, or private person to whom the child was committed, a reasonable sum from time to time for the support, maintenance, and education of the child.” W. Va. Code § 49-7-5 (2008). This Court has interpreted code section

to require “the circuit judge to impose a support obligation upon one or both parents for the support, maintenance and education of the child”, holding that “[t]he entry of an order establishing a support obligation is mandatory; it is not optional.” Syl. Pt. 4, *W. Va. Dep’t of Health & Human Res. v. Smith*, 218 W. Va. 480, 624 S.E.2d 917 (2005). This Court further addressed the issue of the manner in which child support shall be calculated stating that “[a]ny order establishing a child support obligation in an abuse or neglect action filed pursuant to Chapter 49 of the *West Virginia Code* must use the *Guidelines for Child Support Awards* found in *W.Va. Code*, 48-13-101, *et seq.*” *Id.* at Syl. Pt. 5.

The issue of jurisdiction over child support during an abuse and neglect proceeding is clear. “When a child is the subject of an abuse or neglect or other proceeding in a circuit court pursuant to Chapter 49 of the *West Virginia Code*, the circuit court, and not the family court, has jurisdiction to establish a child support obligation for that child.” *Id.* at Syl. Pt. 3. What is not clear whatsoever, is which court has jurisdiction over child support after an abuse and neglect matter has been dismissed.

Pursuant to West Virginia Code § 48-11-105, child support awards are modifiable. Specifically, that section states that “[t]he court may modify a child support order, for the benefit of the child, when a motion is made that alleges a change in the circumstances of a parent or another proper person or persons. A motion for modification of a child support order may be brought by a custodial parent or any other lawful custodian or guardian of the child, by a parent or other person obligated to pay child support for the child or by the Bureau for Child Support Enforcement of the Department of Health and Human Resources of this State.” W.Va. Code § 48-11-105 (a)(2008). Section 48-11-105 further states that “[t]he provisions of the order may be modified if there is a

substantial change in circumstances. If application of the guideline would result in a new order that is more than fifteen percent different, then the circumstances are considered a substantial change.”

The Code mandates at § 48-11-102(c) that all child support orders contain a notice with language stating that “[t]he amount of the monthly child support can be modified as provided by law based upon a change in the financial or other circumstances of the parties if those circumstances are among those considered in the child support formula. In order to make the modification a party must file a motion to modify the child support amount. Unless a motion to modify is filed, the child support amount will continue to be due and cannot later be changed retroactively even though there has been a change of circumstances since the entry of the order. Self help forms for modification can be found at the circuit clerk’s office.” W. Va. Code § 48-11-102(c)(2008).

Further, the West Virginia Code has a myriad of remedies available for non-compliant obligees. For instance, West Virginia Code § 48-14-101 *et. seq.* allows for contempt proceedings and liens against both personal and real property. Additionally, the Bureau of Child Support Enforcement may collect child support from federal income tax refunds (W.Va. Code §18-18-117), state income tax refunds (W.Va. Code §18-18-118) and unemployment compensation (W.Va. Code §18-18-120).

Two questions arise if the *circuit court* has jurisdiction to issue a post-relinquishment order of support for minor children that were the subject of an abuse and neglect proceeding. First, does the circuit court retain jurisdiction over issues of modification and enforcement of that order until the obligee no longer owes a duty of support? Second, do the provisions of the West Virginia Code, beyond that of the statutory child support formula, even apply in abuse and neglect matters? The law is unclear as to the answers to these questions.

It is clear that prevailing West Virginia law requires "a child's parents to meet the obligation of providing that child with adequate food, shelter, clothing, education, and health and child care." W. Va. Code § 48-11-101(a)(2001). "The duty of a parent to support a child is a basic duty owed by the parent to the child." Syl. Pt. 3, (in part), *Wyatt v. Wyatt*, 185 W. Va. 472, 408 S.E.2d 51 (1991). It is not clear whether the West Virginia Supreme Court of Appeals intended this obligation to apply to an individual who is no longer the legal parent to that child.

If it is the intent of this Honorable Court to apply the obligation of child support to biological parents who are no longer legal parents, then it would stand to reason that the child would have a right to increased child support if the obligor earns more income, in which case the standard statutory language regarding modifications should be included in all orders. Further, in fairness to the parent who relinquished his or her rights, the statutory formula should be applied *in whole*. The current practice in this circuit is to use the obligor's income only when calculating child support.

The obligor parent should also have the benefit of requesting a modification of child support, including the use of the provision in W. Va. Code § 48-11-106 for an expedited downward modification in the case of the loss of a job or significant pay decrease. This would require that the obligor have contact information regarding the legal guardians of the child. In many instances, this is an individual foreign to the relinquishing parents, whose identity and contact information would not normally be revealed.

In the instant matter, the record is undisputed that the Respondent Father never had a relationship with the child. He saw the child on a few occasions when the child was a young infant, largely because his mother wished to see the child she believed to be her grandchild. The Respondent Mother never requested an award of support until the day of the Respondent Father's Relinquishment

Hearing, at which time she made her oral motion to the Circuit Court. The Respondent Mother resided with her mother, the child's grandmother during the entire abuse and neglect action. It was abundantly clear from Multi-Disciplinary Team Meetings that the child's grandmother, not the Respondent Mother, provided for a great deal of the child's support.

Further, a fact that this Court should find interesting is the fact that the Respondent Mother chose to forgo the child support owed to her from the time of the filing of the action until the father's relinquishment, a fact which is asserted in the Appellee's Brief and which can be found in the record below. The lower court Judge ruled that a further proceeding would be scheduled on the issue of the amount of child support owed. The Respondent Mother then chose to allow for the entry of an Agreed Dismissal Order and forgo child support, rather than wait the extra few weeks to allow the lower court to hold a hearing on the matter.

The Respondent Mother and the subject child are both young. The continuation of post relinquishment child support would not be in the best interest of the child because it could impede his stability in a loving family. It is very likely that the Respondent Mother will meet someone in the future who may wish to adopt the child as his own. If the Respondent Father is employed by the military or is engaged in other gainful employment that nets the Respondent Mother with a significant child support amount, she may be hesitant to provide the child with permanency and the benefit of two legal parents.

Conclusion

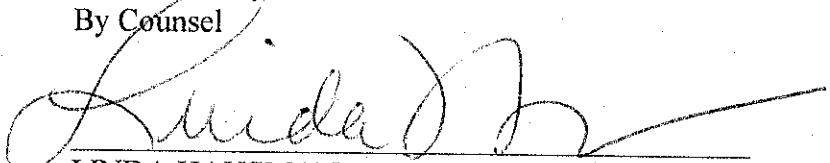
While it may seem counterintuitive that counsel for an infant child would recommend that the mother not receive an award of child support for the benefit of the child, the prospect of permanency and the promotion of a loving two-parent household outweighs the benefit of child

support from a man who admittedly was unable and/or unwilling to parent the child. The father was not working during the entire abuse and neglect proceeding and there is no definitive evidence that he is currently employed. Further, while the law is unclear, at best, in this regard, the prevailing law seems to support the notion that a person who relinquishes his or her parental rights is no longer a parent and no longer has responsibilities to that child.

As a matter of public policy, the award of child support after a parent relinquishes his or her rights will have a chilling effect on relinquishments. This will prolong abuse and neglect proceedings that will ultimately end in involuntary termination. Pending the long process to involuntary termination, the abused child remains in limbo and the goal of permanency will take longer to achieve.

Dated this 31st day of December, 2008.

Infant child Ryan B.
By Counsel



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FROM THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA
HONORABLE THOMAS A. BEDELL, JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of December, 2008, I served the foregoing

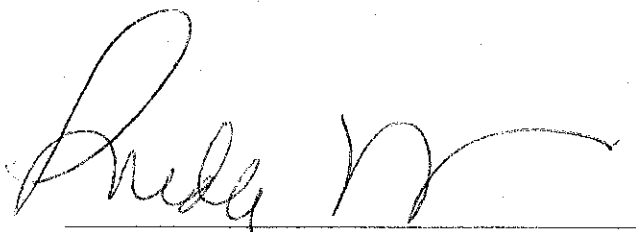
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